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No. 79-1156

In the Supreme Court of the United States

OCTOBER TERM, 1979

G. WILLIAM MILLER, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

CASTLEWOOD INTERNATIONAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent concedes (Br. in Opp. 2) that sales discounts to retailers can "easily be disguised and converted into unlawful gifts or rebates." Respondent also concedes (*id.* at 3) that ATF Ruling 76-16 and the Florida statute have "the common design of restricting the authorized discount from being abused." Respondent nevertheless finds a conflict between the statutory schemes. We do not.

a. Both the court of appeals and respondent err in characterizing ATF Ruling 76-16 as establishing a "floor" below which wholesales prices may not go (Pet. App. 5a; Br. in Opp. 3 & n.3). ATF Ruling 76-16 expressly states that the Bureau "does not take the position that a sale below 'laid-in' cost is automatically a violation of law, but

merely that such a sale is questionable and may be investigated" (Pet. App. 36a). If the investigation discloses that the discount is a subterfuge for granting financial assistance to a retailer, ATF will consider the transaction a proscribed inducement. Even then, violation of 27 U.S.C. 205(b)(3) does not occur unless the statutory elements of exclusion of other suppliers and interstate or foreign commerce are also shown (Pet. App. 36a).[1] See 27 U.S.C. 205(b); Proposed 27 C.F.R. 6.4(a) and 6.21, 44 Fed. Reg. 45305-45306 (1979).

b. This is simply not a situation, as respondent would have it (Br. in Opp. 5, 7), in which one of the statutory schemes must prevail and the other must fall. A wholesaler in Florida may comply fully with both laws by offering discounts on the same terms to all retailers (as required by Florida law), but at the same time ensuring that its prices do not fall below laid-in cost without a business justification (which will ensure compliance with 27 U.S.C. 205(b)(3), as interpreted by ATF Ruling 76-16). Nor would a wholesaler's compliance with 27 U.S.C. 205(b)(3) in this regard frustrate the purposes underlying Florida law. For while Florida law permits prices below wholesale cost without limitation, there is no indication of an affirmative state policy to encourage sales below cost that have no business justification—a situation that may involve predatory pricing.

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[1]Contrary to respondent's apparent misapprehension (Br. in Opp. 8-9), this case does not involve any challenge to Florida's authority under its police power or the Twenty-First Amendment to enact Fla. Stat. Ann. § 561.42 (West Supp. 1979). This case involves only the relationship between that conceded authority and Congress' exercise of its Commerce Clause power over interstate commerce in alcoholic beverages.

2.a. Even if there were thought to be some conflict between the policies underlying the federal and state statutory schemes, this Court's recent decision in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, No. 79-97 (Mar. 3, 1980), makes clear that the Twenty-First Amendment does not excuse wholesalers in Florida from complying with 27 U.S.C. 205(b)(3). The language of Section 2 of the Amendment, which is the primary guide in analyzing the Section's scope (*Midcal*, *supra*, slip op. 9), by its terms prohibits the transportation or importation of intoxicating liquors into a state only for delivery or use "in violation of the laws" of the state. Wholesalers in Florida who comply with federal law by offering price discounts below laid-in cost only for legitimate business reasons will not be "in violation of" Florida law as long as they offer the same terms to all retailers. Surely, then, the federal interest here stands on even firmer footing than that in *Midcal*, where compliance with the Sherman Act did require a violation of state law (which was to that extent superseded).

b. The Court stressed in *Midcal* that the Twenty-First Amendment by its terms gives states control over the "transportation or importation" of alcoholic beverages within their borders, and that this grants the states broad latitude in determining whether to permit importation or sale of liquor and how to structure the liquor distribution system (slip op. 10, 12). The present case involves neither of these core interests protected by the Twenty-First Amendment.[2] The Court made clear that in other areas,

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[2]Nor can there be any serious contention that Florida's policy of encouraging lower prices (Pet. App. 17a) serves a state interest in temperance. Compare *Midcal*, *supra*, slip op. 14.

state regulation may properly be limited by federal legislation enacted under the Commerce Clause (slip op. 12). Here, 27 U.S.C. 205(b)(3), as interpreted by ATF Ruling 76-16, furthers the important federal interest in stopping the Tied House Evil in its incipiency by barring discounts that are a subterfuge for prohibited financial assistance to a retailer or may have the effect of driving competing wholesalers out of the market. Respondent does not advance any countervailing state interest in support of below-cost sales under these circumstances.

3.a. For the reasons given, we believe the court of appeals' decision is inconsistent with this Court's subsequent decision in *Midcal*. At the very least, *Midcal* sheds significant new light on the proper accommodation of state and federal regulation in this area. We therefore suggest that the Court grant the petition for a writ of certiorari and remand the case to the court of appeals for reconsideration in light of this Court's decision in *Midcal*.

b. An additional factor weighs in favor of remand here. On April 22, 1980, the United States Court of Appeals for the District of Columbia Circuit rendered a decision holding that there is no *statutory* authority for ATF Ruling 76-16 if applied to all below-cost sales for which the wholesaler does not advance an affirmative business justification. *National Distributing Co.* v. *United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms*, No. 78-2303 (D.C. Cir. Apr. 22, 1980).[3] The court held that 27 U.S.C. 205(b)(3) can be interpreted to bar sales below cost that are offered on similar terms to all retailers only if the retailer, as part of the transaction, makes an agreement about future sales or other matters

[3]We have lodged ten copies of the court's opinion in *National Distributing Co.* with the Clerk of this Court.

that might tie the retailer to the supplier or if the transaction is intended to give the wholesaler control over retailers or drive a competing wholesaler out of business (slip op. 2, 12 & n.27, 47-48). ATF, in consultation with this Department, is now assessing that decision.

The Fifth Circuit in the present case did not address the statutory issue decided by the District of Columbia Circuit in *National Distributing Co.*, no doubt because respondent did not seriously challenge the statutory basis or apparent scope of ATF Ruling 76-16.[4] If ATF should refine ATF Ruling 76-16 as a result of recent developments, it would be appropriate to present this new information to the court of appeals in the first instance.[5]

[4]Respondent only suggested in passing (Appellant's Br. at 22-23) that ATF Ruling 76-16 was somehow anticompetitive and was therefore "ultra vires" under 27 U.S.C. 205(b)(3).

[5]As we pointed out in our petition for a writ of certiorari (Pet. 28-29), the Fifth Circuit's decision in this case has been invoked by the industry in a number of challenges to proposed ATF regulatory measures where there is a state law addressing the same subject. In *Wine Industry of Florida* v. *Miller*, 609 F. 2d 1167 (5th Cir. 1980), the Fifth Circuit relied on the decision below in holding that ATF Ruling 77-4, which prohibits wholesalers from stocking retailers' shelves and marking retail prices, is invalid under the Twenty-First Amendment as applied in Florida because it conflicts with a Florida statute authorizing such services. We believe that the Fifth Circuit's decision in *Wine Industry*, as in the present case, was incorrect.

We have decided not to petition for certiorari in the *Wine Industry* case, however. ATF proposed regulations last August that would supersede ATF Ruling 77-4 and allow servicing of retail establishments by wholesalers. Proposed 27 C.F.R. 6.98, 44 Fed. Reg. 45309 (1979). ATF informs us that the comprehensive regulations of which the cited provision is a part will be promulgated in final form sometime within the next several months and that it appears likely that the proposed 27 C.F.R. 6.98 will be promulgated in essentially the same form as initially proposed. It thus appears that there will no longer be a live controversy with respect to ATF Ruling 77-4.

For the reasons given, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of this Court's decision in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980